(1)

91-1418

Supreme Court, U.S.
FILED
MAR 4 1992
OFFICE OF THE CLERK

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

In re WESLEY G. HARLINE,

Debtor.

DAVID L. GLADWELL, Trustee,

Petitioner,

v.

WESLEY G. HARLINE,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

MONA LYMAN
McKAY, BURTON & THURMAN
1200 Kennecott Building
10 East South Temple
Salt Lake City, Utah 84133
(801) 521-4135

TIMOTHY B. DYK
(Counsel of Record)
PATRICIA A. DUNN
STEPHEN J. GOODMAN
JONES, DAY, REAVIS
& POGUE
1450 G Street, N.W.
Washington, D.C. 20005-2088
(202) 879-3939
Counsel for Petitioner

QUESTION PRESENTED

Whether, the phrase "applicable nonbankruptcy law," as used in Section 541(c)(2) of the Bankruptcy Code, refers only to state spendthrift trust law or whether it also refers to the "anti-alienation" provision of ERISA (29 U.S.C. § 1056(d)(1))?

PARTIES TO THE PROCEEDING

The parties to the proceedings in the court below were: David L. Gladwell, as Trustee in the bankruptcy proceeding of Wesley G. Harline; and Wesley G. Harline.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 2

JURISDICTION 2

STATUTES INVOLVED 2

STATEMENT 4

REASONS FOR GRANTING THE WRIT 11

I. THE FEDERAL COURTS OF APPEALS ARE DIVIDED ON THE PROPER SCOPE OF SECTION 541(C)(2) 11

II. THE COURT BELOW MISINTERPRETED SECTION 541(C)(2) 13

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Raine (In re Moore), 907 F.2d 1476 (4th Cir. 1990) 10,12

Daniel v. Security Pacific National Bank (In re Daniel), 771 F.2d 1352 (9th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986) 10,12

Forbes v. Lucas (In re Lucas), 924 F.2d 597 (6th Cir.), *cert. denied*, 111 S. Ct. 2275 (1991) 10,12

Goff v. Taylor (In re Goff), 706 F.2d 574 (5th Cir. 1983) 10,12,15

Harline v. Gladwell (In re Harline), 950 F.2d 669 (10th Cir. 1991) 12

Lichstrahl v. Bankers Trust (In re Lichstrahl), 750 F.2d 1488 (11th Cir. 1985) 10,12

Samore v. Graham (In re Graham), 726 F.2d 1268 (8th Cir. 1984) 10,12,14

Shumate v. Patterson, No. 91-913 (U.S. cert. granted Jan. 21, 1992) 5,11,12,16

Shumate v. Patterson, 943 F.2d 362 (4th Cir. 1991), *cert. granted*, 117 L.Ed. 2d 104 (1992) 5

Velis v. Kardanis, 949 F.2d 78 (3d Cir. 1991) 10,12

TABLE OF AUTHORITIES -- Continued

STATUTES

Bankruptcy Code, 11 U.S.C. § 101 *et seq.*
(1988 and Supp. II 1990) 4

11 U.S.C. § 522 13
11 U.S.C. § 541 . . . . . *passim*

Employee Retirement Income Security Act (ERISA),
29 U.S.C.S. § 1001 *et seq.*
(Law. Co-op. 1990 & Supp. 1991) 5

29 U.S.C.S. § 1056(d)(1) 5,14
29 U.S.C.S. § 1144(d) 14

LEGISLATIVE HISTORY

H.R. Rep. No. 595, 95th Cong., 1st Sess. (1977),
reprinted in, 1978 U.S. Code Cong. &
Admin. News 5963 14,15

S. Rep. No. 95-989, 95th Cong., 2nd Sess. (1978),
reprinted in, 1978 U.S. Code Cong. &
Admin. News 5787 15

MISCELLANOUS

Petition for a Writ of Certiorari,
Patterson v. Shumate, No. 91-913 (U.S.
cert. granted Jan. 21, 1992) 5

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

No. ____

In Re: WESLEY G. HARLINE,

Debtor.

DAVID L. GLADWELL, Trustee,

Petitioner,

v.

WESLEY G. HARLINE,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

David L. Gladwell, Trustee, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (App. 1a) is reported at 950 F.2d 669. The memorandum decision of the United States District Court for the District of Utah, Central Division (App. 21a), affirming the judgment of the bankruptcy court, is unreported. The judgment of the United States Bankruptcy Court for the District of Utah, Northern Division (App. 28a) is unreported.

JURISDICTION

The court of appeals entered its judgment on December 5, 1991. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1988).

STATUTES INVOLVED

Section 522 of the Bankruptcy Code, 11 U.S.C. § 522 (1988), provides, in pertinent part:

(b) Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate the property listed in either paragraph (1) or, in the alternative, paragraph (2) of this or, subsection.

* * *

(d) The following property may be exempted under subsection (b)(1) of this section:

* * *

(10) The debtor's right to receive --

(E) a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, unless--

(i) such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose;
(ii) such payment is on account of age or length of service; and
(iii) such plan or contract does not qualify under section 401(a), 403(a), 403(b), 408, or 409 of the Internal Revenue Code of 1954 (26 U.S.C. 401(a), 403(a), 403(b), 408, or 409).

Section 541 of the Bankruptcy Code, 11 U.S.C. § 541 (1988 and Supp. II 1990), provides, in pertinent part:

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

* * *

(c)(2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

29 U.S.C.S. § 1056(d)(1) (Law. Co-op. 1990) provides:

Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

29 U.S.C.S. § 1144(d) (Law. Co-op. 1990) provides:

Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(b) of this title) or any rule or regulation issued under any such law.

STATEMENT

Introduction

Section 541(c)(2) of the Bankruptcy Code, 11 U.S.C. § 541(c)(2), excludes from the bankruptcy estate any "beneficial interest of the debtor in a trust . . . " when "applicable nonbankruptcy law . . . " prohibits the transfer of that interest. This case presents the question

whether Section 541(c)(2) applies to ERISA-qualified[1] pension and profit sharing plans that do not qualify as valid spendthrift trusts under state law. In other words, does the phrase "applicable nonbankruptcy law," as used in Section 541(c)(2), refer only to state spendthrift trust law or does it include, as well, the "anti-alienation" provisions of ERISA?[2] This Court recently granted certiorari to resolve a conflict among the Circuits on this very issue. *Shumate v. Patterson*, 943 F.2d 362 (4th Cir. 1991), *cert. granted*, 117 L.Ed.2d 104 (1992).[3]

Background

On February 14, 1986, respondent Wesley G. Harline ("Harline") filed a voluntary petition in bankruptcy under Chapter 11 of the Bankruptcy Code. Complaint, Appellant's Addendum to Opening Brief in the Tenth Circuit ("Appellant's Addendum"), Exh. 5 at ¶ 7; Proposed Answer, Appellant's Addendum Exh. 6 at

---

[1]Employee Retirement Income Security Act (ERISA), 29 U.S.C.S. § 1001 *et seq.* (Law. Co-op. 1990 and Supp. 1991)

[2]29 U.S.C. § 1056(d)(1), the "anti-alienation" provision of ERISA, requires "[e]ach pension plan [to] provide that benefits provided under the plan may not be assigned or alienated."

[3]The Court, in *Patterson*, agreed to consider all three of the questions presented by the petition, the first of which was "[i]s the antialienation requirement of 29 USC § 1056(d)(1) included as 'applicable nonbankruptcy law' under 11 USC § 541(c)(2) or is 'applicable nonbankruptcy law' limited to state spendthrift trust law?" Petition for a Writ of Certiorari at i, *Patterson v. Shumate*, No. 91-913 (U.S. cert. granted Jan. 21, 1992). The exemption question presented by the petition in *Patterson* has not been raised or argued in the case at bar.

¶ 1. Later in 1986, the bankruptcy case was converted to a Chapter 7 proceeding. Appellant's Opening Brief in the Tenth Circuit ("Appellant's Brief"), at 5. Petitioner David L. Gladwell ("Gladwell") was subsequently appointed as the Chapter 7 trustee. Respondent's Exhibit Addendum in the Tenth Circuit ("Respondent's Addendum"), Exh. 8 at 1.

At the time that Harline filed his bankruptcy petition, he was the sole stockholder of the Weber Clinic, Inc. Complaint, Appellant's Addendum Exh. 5 at ¶ 8; Answer, Appellant's Addendum Exh. 6 at ¶ 2. He was also the sole beneficiary of the Weber Clinic Profit-Sharing Trust ("the Trust"), a retirement plan for employees of the Weber Clinic, Inc. Response to Request for Admissions, Appellant's Addendum Exh. 9 at ¶ 7. The trustee was the Key Bank of Utah ("Key Bank"), and the assets of the Trust included three policies insuring Harline's life. Response to Request for Admissions, Appellant's Addendum Exh. 8 at ¶ 8; Bankruptcy Court's Findings of Fact, attached as Appendix A-1 to Appellant's Brief, at ¶ 5. Harline has asserted that the Trust was a qualified ERISA plan. Appellant's Brief, at 8.

The Weber Clinic Profit-Sharing Trust Agreement ("the Agreement") provided that the board of directors of the Weber Clinic, Inc. had the right at any time to terminate the plan. Agreement, Appellant's Addendum Exh. 1 at 17. Thus, as the sole shareholder of the Weber Clinic, Inc., Harline could terminate the plan at any time that he wished. The Agreement also provided that the Deferred Compensation Committee ("the

Committee"), of which Harline was the sole member,[4] had the "right at any time to direct the Trustee in writing with reference to the retention, sale or exchange, encumbrance, lease, management and control of any property of this trust, and with respect to the investment or reinvestment of any of the trust funds in any property that the Committee may deem advisable . . . ." *Id.* at 12. Harline also had the right (subject to the approval of the Committee) to receive his trust funds, in monthly installments, while continuing to work at the clinic.[5] The Committee (i.e., Harline) also could, in its "discretion," direct that in the case of "extreme hardship," the trustee loan or pay out to Harline part or all of his vested interest in the plan. Amendment to Agreement, Appellant's Addendum Exh. 2 at 3. And, at the time that he filed for bankruptcy, Harline's interest in the trust was fully vested and he had a right (by retiring) to receive a lump sum distribution of that interest.

---

[4]The Agreement provided that the members of the Committee were to be elected from among the employees covered under the plan. Agreement, Appellant's Addendum Exh. 1 at 10. As the sole beneficiary under the plan, Harline was thus the sole member of the Committee.

[5]At the time that he filed for bankruptcy, Harline was 64 years of age. Response to Requests for Admission, Appellant's Addendum Exh. 9 at ¶ 16. The Agreement provided that once a beneficiary reached the age of 55, "he may request the Committee [in its discretion] to pay such Member his accumulated trust funds in monthly installments." Agreement, Appellant's Exh. 1 at ¶ 6.

Response to Requests for Admissions, Appellant's Addendum Exh. 9 at ¶ 15.[6]

Harline did not list his beneficial interest in the Trust as an asset in his bankruptcy schedules. Statement of Affairs for Debtor Not Engaged in Business, Respondent's Addendum, Exh. 10, Schedule B. Nor did Harline disclose to Gladwell, in any other way, Harline's interest in the Trust. Affidavit in Support For Summary Judgment, Respondent's Addendum, Exh. 8.

Upon discovering that Harline had an interest in the Trust, Gladwell filed suit against Key Bank, the trustee for the Trust, in the United States Bankruptcy Court for the District of Utah, Northern Division ("the bankruptcy court"). The suit, filed on November 30, 1988, sought an order compelling Key Bank to turn over Harline's interest in the Trust to the bankruptcy estate. Complaint, Appellant's Addendum Exh. 5. Harline subsequently intervened as a defendant in the lawsuit. Motion to Intervene and Proposed Answer, Appellant's Addendum Exh. 6.

Gladwell filed a Motion for Summary Judgment, which the bankruptcy court granted on November 7, 1989. Appendix to Petition for Writ of Certiorari ("App."), at 28a-32a. The bankruptcy court rejected Harline's contention that the Trust constituted a spendthrift trust under Utah law and held that his "entire

---

[6]The Agreement specified that any beneficiary over 55 years of age could retire and, at the direction of the Committee (Harline), collect his vested benefits either in a lump sum or in installments. Third Amendment to Agreement, Appellant's Addendum Exh. 4 at 2.

interest" in the Trust constituted property of the bankruptcy estate under 11 U.S.C. § 541. App. 31a. Accordingly, it ordered Key Bank and Harline to turn over Harline's interest in the trust to the bankruptcy estate. App. 32a.

Harline (but not Key Bank) appealed to the United States District Court for the District of Utah, Central Division, which affirmed the judgment of the bankruptcy court. The district court held that because Harline was the sole member of the Committee, which "controls the disposition or withdrawal of assets," he therefore had "complete control over the operation of the Trust," and it was not a spendthrift trust under Utah law. App. 25a-26a.

Harline then appealed to the United States Court of Appeals for the Tenth Circuit, which reversed and remanded for a determination of whether the Trust was indeed a "qualified" ERISA plan. The court of appeals held that the Trust was not a spendthrift trust, under Utah law, because "Dr. Harline's power as the only officer, director, and shareholder of the Weber Clinic, Inc. to amend or terminate the plan is fatal to spendthrift status, particularly when he already is beyond the plan's normal retirement age and is sole member of the deferred compensation committee." App. 8a-9a. However, the court of appeals held that if the Trust were a "tax-qualified ERISA pension or profit sharing

plan," it would be "exempt from the bankruptcy estate under § 541(c)(2)." App. 13a-14a.[7]

The court of appeals acknowledged that "[s]everal of the circuit courts that have considered § 541(c)(2)'s applicability to interests in ERISA qualified pension and profit sharing plans have declared they are excluded from the bankruptcy estate only if they qualify as valid spendthrift trusts under state law." App. 5a.[8] However, it also noted that the Third, Fourth, and Sixth Circuits had "reached the contrary result, and have ruled that qualified ERISA pension and profit sharing plan interests are not assets of the bankruptcy estate under § 541(c)(2)." App. 12a.[9] The court of appeals declared itself "persuaded by the reasoning of the Third, Fourth, and Sixth Circuit opinions . . . " because (1) in other sections of the Bankruptcy Code, Congress had used the phrase "applicable nonbankruptcy law" to refer to both federal and state law; (2) it would be "incongru[ous]" to interpret "ERISA's antialienation provisions trumping

---

[7]The court of appeals held that the ERISA issue had been raised below and was properly before it, notwithstanding Gladwell's contention to the contrary. App. 9a-10a.

[8]Citing *Daniel v. Security Pac. Nat'l Bank (In re Daniel)*, 771 F.2d 1352, 1360 (9th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986); *Lichstrahl v. Bankers Trust (In re Lichstrahl)*, 750 F.2d 1488, 1490 (11th Cir. 1985); *Samore v. Graham (In re Graham)*, 726 F.2d 1268, 1273-274 (8th Cir. 1984); *Goff v. Taylor (In re Goff)*, 706 F.2d 574, 581-82 (5th Cir. 1983).

[9]Citing *Anderson v. Raine (In re Moore)*, 907 F.2d 1476, 1477 (4th Cir. 1990); *Forbes v. Lucas (In re Lucas)*, 924 F.2d 597, 601 (6th Cir.), *cert. denied*, 111 S. Ct. 2275 (1991); *Velis v. Kardanis*, 949 F.2d 78, 82 (3d Cir. 1991).

state law until bankruptcy, but withdrawing that protection upon bankruptcy unless state law would give it"; and (3) "the clear policy and intent of ERISA" was to protect participants' pension benefits. App. 14a-18a.

The court of appeals therefore concluded that "if the plan is tax-qualified and Dr. Harline has not retired or terminated employment with the employer sponsor of the plan, his interest is excluded from his bankruptcy estate under § 541(c)(2)." App. 20a.[10] Because the court was unable to determine, on the record before it, "whether or not the plan is indeed currently 'qualified' under ERISA," it remanded the case for a determination of that issue. *Id.* On January 21, 1992, this Court granted certiorari in *Patterson*.

REASONS FOR GRANTING THE WRIT

I. THE FEDERAL COURTS OF APPEALS ARE DIVIDED ON THE PROPER SCOPE OF SECTION 541(c)(2)

The proper disposition of the present case depends upon this Court's impending decision in *Patterson*. In *Patterson*, this Court agreed to decide whether Section 541(c)(2), which excludes a debtor's beneficial interest in a trust from the bankruptcy estate when "applicable nonbankruptcy law" prohibits the transfer of that interest, refers only to state spendthrift trust law or whether "applicable nonbankruptcy law" also includes the

---

[10]It also held that "[i]f the plan is not qualified then it is not protected by ERISA, nor as a spendthrift trust under state law, and no other 'nonbankruptcy' law has been cited which might apply." App. 20a.

anti-alienation provisions of ERISA. The court of appeals, in the present case, held that the Trust at issue is not a spendthrift trust under state law. Thus, if this Court decides, in *Patterson*, that Section 541(c)(2) refers only to state spendthrift trust law, and not to ERISA, then the court of appeals' decision should be reversed, and judgment should be entered in favor of Gladwell.

This Court has already recognized the importance of resolving this question of federal law. The federal courts of appeals have disagreed over the proper interpretation of Section 541(c)(2), creating intolerable confusion concerning the interplay of ERISA and the Bankruptcy Code. The Fifth, Eighth, Ninth, and Eleventh Circuits have held that the term "applicable nonbankruptcy law," as used in Section 541(c)(2), refers only to state spendthrift trust law. *Goff v. Taylor (In re Goff)*, 706 F.2d 574, 581-82 (5th Cir. 1983); *Samore v. Graham (In re Graham)*, 726 F.2d 1268, 1273-274 (8th Cir. 1984); *Daniel v. Security Pac. Nat'l Bank (In re Daniel)*, 771 F.2d 1352, 1360 (9th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986); *Lichstrahl v. Bankers Trust (In re Lichstrahl)*, 750 F.2d 1488, 1490 (11th Cir. 1985). On the other hand, the Third, Fourth, Sixth, and Tenth Circuits have held that "applicable nonbankruptcy law" includes ERISA. *Velis v. Kardanis*, 949 F.2d 78, 82 (3d Cir. 1991); *Anderson v. Raine (In re Moore)*, 907 F.2d 1476, 1477 (4th Cir. 1990); *Forbes v. Lucas (In re Lucas)*, 924 F.2d 597, 601 (6th Cir.), *cert. denied*, 111 S. Ct. 2275 (1991); *Harline v. Gladwell (In re Harline)*, 950 F.2d 669 (10th Cir. 1991).

Accordingly, Gladwell requests that this Court grant his petition for certiorari. However, because this case presents the same question which this Court has already agreed to hear in *Patterson*, the Court may wish to hold this case pending disposition of *Patterson*.

II. THE COURT BELOW MISINTERPRETED SECTION 541(c)(2)

As several circuits have held, the better-reasoned interpretation of Section 541(c)(2) is that the term "applicable nonbankruptcy law" refers only to state spendthrift trust law and not to ERISA.

Section 541(a)(1) of the Bankruptcy Code provides that the bankruptcy estate shall include "all legal or equitable interests of the debtor in property as of the commencement of the case," except for those interests specified in Sections 541(b) and 541(c)(2).[11] Once property has been included in the estate, the debtor may be able to exempt it from the estate pursuant to the exemptions set forth in Section 522 of the Code.

One problem with the court of appeals' interpretation of Section 541(c)(2) is that, as the Eighth Circuit has pointed out, "pension benefits are specifically

---

[11]Section 541(b), which is not relevant to the present case, excludes from the estate (1) "any power that the debtor may exercise solely for the benefit of an entity other than the debtor," (2) certain interests of the debtor "as a lessee under a lease of nonresidential real property . . . ," and (3) "any eligibility of the debtor to participate in programs authorized under the Higher Education Act of 1965 . . . or any accreditation status or State licensure of the debtor as an educational institution."

treated under the [Bankruptcy] Code's *exemption* provision, clearly indicating that they were intended and assumed to be part of the estate." *In re Graham*, 726 F.2d at 1272 (emphasis in original).[12] If Congress had intended to exclude ERISA-qualified pension benefits from the bankruptcy estate under Section 541(c)(2), there would have been no point in providing for the exemption of such benefits.

The court of appeals also failed to discuss the effect of 29 U.S.C. § 1144(d), which provides that "[n]othing in this [ERISA] subchapter [including the "anti-alienation" provision in 29 U.S.C. § 1056(d)(1)] shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under any such law." Accordingly, "while ERISA-required anti-alienation clauses may preempt state law and preclude the use of judgment enforcement devices provided thereunder, they do not preclude inclusion of pension benefits in a debtor's bankruptcy estate by operation of federal law." *In re Graham*, 726 F.2d at 1273.

Finally, the legislative history of Section 541(c)(2) establishes that it was intended only to preserve the excluded status which spendthrift trusts had enjoyed under the old Bankruptcy Act. *See, e.g.*, H.R. Rep. No. 595, 95th Cong., 1st Sess. 175-176 (1977), *reprinted in*

---

[12]Section 522(d)(10)(E) of the Bankruptcy Code, which sets forth one of the "federal" exemptions provided by the Code, exempts "a payment under a stock bonus, pension, profit-sharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor . . . ."

1978 U.S. Code Cong. & Admin. News 5963, 6136 ("[t]he bill . . . continues over [from the Bankruptcy Act] the exclusion from property of the estate of the debtor's interest in a spendthrift trust to the extent the trust is protected from creditors under applicable State law"); *id.* at 369, *reprinted in* 1978 U.S. Code & Cong. & Admin. News at 6325 ("[p]aragraph (2) of subsection (c) [of Section 541], however, preserves restrictions on transfer of a spendthrift trust to the extent the restriction is enforceable under applicable nonbankruptcy law").[13]

For all of these reasons, the judgment of the court of appeals should be reversed, and judgment should be entered in favor of Gladwell.

---

[13]*See also* S. Rep. No. 95-989, 95th Cong., 2d Sess. 83 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5869 (Section 541(c)(2) "preserves restrictions on a transfer of a spendthrift trust . . . enforceable [under] nonbankruptcy law"). H.R. 8200 was ultimately "passed in lieu of the Senate Bill, H.R.S. 2266, after amendments containing much of the Senate bill's language." *In re Goff*, 706 F.2d at 582 n.21.

CONCLUSION

The petition for certiorari should be granted. However, because this case presents the same question which this Court has already agreed to hear in *Patterson*, the Court may wish to hold this case pending disposition of *Patterson*.

Respectfully submitted,

MONA LYMAN
McKAY, BURTON
& THURMAN
1200 Kennecott Building
10 East South Temple
Salt Lake City, Utah 84133

TIMOTHY B. DYK
(Counsel of Record)
PATRICIA A. DUNN
STEPHEN J. GOODMAN
JONES, DAY, REAVIS
& POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

March 4, 1992

APPENDIX

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

In Re: WESLEY G. HARLINE,	)	
	)	
Debtor.	)	
	)	No. 90-4157
DAVID L. GLADWELL, Trustee,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	
	)	
WESLEY G. HARLINE,	)	
	)	
Defendant-Appellant.	)	

APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF UTAH
(D.C. Civil No. 90-NC-0022-S)

Submitted on the briefs:

Paul N. Cotro-Manes, Salt Lake City, Utah, for Defendant-Appellant.

Mona Lyman of McKay, Burton & Thurman, Salt Lake City, Utah, for Plaintiff-Appellee.

Before LOGAN, MOORE and BALDOCK, Circuit Judges.

LOGAN, Circuit Judge.

This appeal involves in an unusual context an important legal issue--whether a beneficial interest in a profit sharing trust is part of a debtor's estate under 11 U.S.C. § 541 available to satisfy creditors' claims.[1]

Wesley G. Harline (Dr. Harline) filed a petition in bankruptcy for reorganization of his affairs under Chapter 11, which was later converted to a Chapter 7 proceeding. He did not list as an asset of his estate his beneficial interest in a profit sharing trust of the Weber Clinic, Inc. On discovering the existence of that interest bankruptcy trustee David L. Gladwell sued the trustee of the profit sharing trust, the Key Bank of Utah (bank trustee), to secure Dr. Harline's interest as an asset of the bankruptcy estate. Dr. Harline became an intervening defendant and carried the burden of the litigation.

The bankruptcy court granted a summary judgment motion ordering the property to be turned over to the bankruptcy estate. On appeal the district court affirmed. Dr. Harline now seeks to obtain a determination that the profit sharing plan interest is not an asset of the estate under 11 U.S.C. § 541, either because (1) it is a valid spendthrift trust under Utah law or (2) it is exempt

---

[1] After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

as a qualified Employee Retirement Income Security Act (ERISA) plan.[2]

The record in this case is not as fully developed as we would like. But it appears that Dr. Harline practiced medicine in association with other doctors, now deceased, doing business as the Weber Clinic. This clinic was unincorporated at the time the profit sharing trust was established in 1960, but was asserted to be an "association taxable as a corporation." Second Amendment to Weber Clinic Profit-Sharing Trust, Respondent's Ex. Add., tab 3 at 1. In 1971 the association was "transformed into a Utah professional corporation." *Id.* Thereafter the trust was operated as a corporate retirement plan. The record indicates that Weber Clinic, Inc. is still a professional corporation with Dr. Harline as the sole shareholder, the sole remaining

---

[2] Dr. Harline also argues that we must reverse because the insurance companies whose policies are the sole assets in the plan are necessary parties to this action. The district court ruled that Dr. Harline had not raised the issue before the bankruptcy court. But it found alternatively that they were not necessary parties, and we agree. The insurance policies are assets of the profit sharing trust to which title is held by the bank trustee. That trustee is a party to this action, and if the bankruptcy and district courts correctly found Dr. Harline's interest in the plan to be an asset subject to the claims of creditors, the bank trustee has the power and the duty to make the cash surrender value or the policies themselves available to the bankruptcy trustee. We also do not consider Dr. Harline's refund claim for post-petition insurance premium payments as that issue is not sufficiently developed in the record. If, as Dr. Harline argues, he is not the settlor of the profit sharing trust but a mere employee beneficiary not entitled to benefits because he has not retired or terminated his employment, then he would not be a proper claimant since the post-petition contributions would have been made by his employer, the Weber Clinic, Inc.

beneficiary of the plan, and the sole member of its deferred compensation committee. It is unclear from the record whether the corporation has ceased making contributions to the plan.[3] The plan's sole remaining assets, held for Dr. Harline's account, are three insurance policies with cash values totalling more than $336,000. Dr. Harline asserts that the plan is "qualified" under ERISA.

I

Section 541 of the Bankruptcy Code, 11 U.S.C. § 541, includes in the bankruptcy estate essentially all beneficial ownership interests of a debtor unless the interest contains "[a] restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under *applicable nonbankruptcy law*." *Id.* § 541(c)(2) (emphasis added). A beneficial interest in an ordinary spendthrift trust would clearly qualify for the exemption if the state courts would hold that creditors could not reach the interest. *See Goff v. Taylor (In re Goff)*, 706 F.2d 574, 581-82 (5th Cir. 1983) (detailing legislative history). Several of the circuit courts that have considered § 541(c)(2)'s applicability to interests in ERISA qualified pension and profit sharing plans have declared they are excluded from the bankruptcy estate only if they qualify as valid spendthrift trusts under state law. *Daniel v. Security Pac. Nat'l Bank (In re Daniel)*,

---

[3] Dr. Harline's brief in the district court states that "[t]he debtor-defendant had used his own funds, earned post petition to pay on the premiums due on several of the policies. . . ." I R. Supp. tab 3 at 3. His brief in this court states that "Appellant had paid in post earned monies to keep the policies in force. . . ." Appellant's Opening Brief at 26.

771 F.2d 1352, 1360 (9th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986); *Lichstrahl v. Bankers Trust (In re Lichstrahl)*, 750 F.2d 1488, 1490 (11th Cir. 1985); *Samore v. Graham (In re Graham)*, 726 F.2d 1268, 1273-74 (8th Cir. 1984); *Goff*, 706 F.2d at 580. In the instant case, the bankruptcy and district courts accepted this reading of § 541(c)(2) and focused upon whether Utah would recognize spendthrift trusts (concluding that it would) and whether Dr. Harline's interest in the profit sharing trust qualified as a spendthrift trust (concluding that it did not). Both courts ruled that Dr. Harline's interest in the trust had to be included in his bankruptcy estate.

A

Utah has never directly approved of the spendthrift trust. Dr. Harline has moved to certify this issue to the Utah Supreme Court. Following our review of the Utah cases that do address spendthrift trusts, we are satisfied that Utah would follow the vast majority of courts which recognize traditional state law spendthrift trusts and would adopt the views of those courts as to the characteristics required to create such a trust. Therefore, we deny the motion to certify this issue.

The Utah Supreme Court apparently first considered spend-thrift trusts in *Cronquist v. Utah State Agricultural College*, 201 P.2d 280 (Utah 1949). Looking to authority from other jurisdictions, the court discussed their characteristics and requirements. The court held that the trust before it was not a spendthrift trust because it contained none of the traditional spendthrift trust provisions and the language of the trust failed to

indicate in any way that the settlor intended to create a spendthrift trust. *Id.* at 284. The court then said, "[t]his opinion is not to be construed as a holding by implication that spendthrift trusts are valid in Utah to any extent. As to that question, we express no opinion. It must await an occasion where a spendthrift trust was intended to be created." *Id.* at 285.

Nonetheless, there are strong indications that Utah would recognize spendthrift trusts. For example, in *Leach v. Anderson*, 535 P.2d 1241 (Utah 1975), the Utah Supreme Court, in reviewing an alleged spendthrift trust that was invalidated as violating Utah Code Ann. § 25-1-11, which makes conveyance in trust for the use of the settlor void as to his existing or subsequent creditors, stated:

> "It is not to be supposed that that statute was intended to limit or interfere with other traditional and beneficial uses of trusts. That a trustor can deal generally with his property as he desires we have no doubt; and this includes placing it in an irrevocable trust, beyond his own power to reclaim, or to sell or alienate it; and may include a so-called 'spendthrift trust' provision to safeguard against improvident dissipation thereof."

Id. at 1243. *See also Territorial Sav. & Loan Ass'n v. Baird*, 781 P.2d 452, 456-57 (Utah App. 1989). Two Utah bankruptcy court decisions, *In re Martin*, 115 B.R. 311, 316 (Bankr. D. Utah 1990), and *In re Kerr*, 65 B.R. 739, 745 (Bankr. D. Utah 1986), conclude that Utah would follow the traditional view of spendthrift trusts. *Id.* at 316.

B

"Traditionally, there are three requirements for a spendthrift trust: (1) the settlor may not be a beneficiary of the trust plan, (2) the trust must contain a clause barring any beneficiary from voluntarily or involuntarily transferring his interest in the trust, and (3) the debtor-beneficiary must have no present dominion or control over the trust corpus." *Williams v. Board of Pensions of the Church of God. Inc. (In re Tomer)*, 117 B.R. 391, 394 (Bankr. S.D. Ill. 1990); *see Restatement (2d) Trusts* §§ 153, 156 (1959). The district court concluded that the Weber Clinic trust was not a spendthrift trust because it determined that the trust was self-settled and that, as the single member of the trust's deferred compensation committee and the sole shareholder of the corporation, Dr. Harline had "complete dominion" over the trust property, following *Lichstrahl*, 750 F.2d at 1490. I R. tab 5 at 7.

We agree with the district court that the trust, on the particular facts before us, does not qualify as a spendthrift trust. We need not decide the questions of whether Dr. Harline is the settlor either because the trust was established before the Weber Clinic was incorporated or because Utah would disregard the corporate entity. *In re Velis*, 123 B.R. 497, 509 (D. N.J. 1991) (court cannot disregard corporate entity simply because debtor is sole shareholder). Like the *Lichstrahl* court, we believe Dr. Harline's power as the only officer, director, and shareholder of the Weber Clinic, Inc. to amend or terminate the plan is fatal to spendthrift status, particularly when he already is beyond the plan's normal retirement age and is sole member of the

deferred compensation committee. Dr. Harline could take his interest in the plan without penalty and continue to practice medicine either as a corporate employee or after dissolving the corporation. As we read the plan documents, although amendments have introduced ambiguities, Dr. Harline, having attained the age of fifty-five may request the committee (consisting of himself alone) to pay him his accumulated trust fund interest while continuing his employment. *See* The Weber Clinic Profit-Sharing Trust Agreement, Respondent's Ex. Add., tab 1 at 6; *see also id.* tab 2 at 1, 3, and tab 5 at 2.

II

A

Our conclusion that Utah state courts would not consider Dr. Harline's interest in the profit sharing trust as a valid spendthrift trust does not resolve the appeal. In his appellate brief Dr. Harline asks us to find "whether an ERISA qualified plan" is includable in his bankruptcy estate under 11 U.S.C. § 541. Appellant's Opening Brief at 2.

The bankruptcy trustee argues that this issue was not raised below and hence is not properly before us. We do not agree. We apparently do not have in the appellate record everything filed in the bankruptcy court, but the seventh issue raised in the designation of record on appeal and statement of issues filed in the bankruptcy court was "[d]id the Court err in ruling that a qualified profit sharing trust could be invaded by the Trustee in Bankruptcy?" Appellant's Add. No. 12. The issue was raised, inartfully to be sure, in the district court. In Dr.

Harline's brief before the district court he identified the plan as an ERISA plan, I R. Supp. tab 3 at 3; he also stated that one of the issues was "[d]id the Court err in ruling that a qualified profit sharing trust could be invaded by the Trustee in Bankruptcy?" *Id.* at 1. He argued in that brief that "Congress when it amended the ERISA existing law in 1974 in adopting the Retirement Income Security Act, codified under 29 U.S.C. § 1101, *et seq.*, had the intent to make the defined benefit plans the exclusive property of the beneficiaries under the plan." *Id.* at 8-9. He cited federal tax regulations on the ERISA requirements for spendthrift provisions in qualified plans, *id.* at 9-11, and finished with this plea: "Admittedly some bankruptcy cases have paid little heed to the IRS regulations or laws with respect to the applicability under the Bankruptcy laws. However it is submitted that some credence must be applied to the acts of congress in the overall scheme of federal law." *Id.* at 11.

No doubt Dr. Harline was discouraged in pursuing an ERISA exemption argument because the bankruptcy court in Utah previously had adopted the view of the only four circuit courts that had considered the matter to that date, all of which held that retirement plan interests would be excluded from the bankruptcy estate only if enforceable under state law as spendthrift trusts. *See In re Kerr*, 65 B.R. at 744. We read the district court's opinion as adopting the same view. We hold that the issue of ERISA preemption is properly before us.

B

ERISA, of course, overrides state law in the area of employee retirement benefits it covers, and its preemption feature has been broadly construed. *See FMC Corp v. Holliday*, 111 S. Ct. 403, 407 (1990). Thus, apart from the Bankruptcy Code there is no doubt that a "qualified" pension or profit sharing plan containing provisions protecting against creditors' claims, as required by ERISA, would override any state law to the contrary.[4] To be "qualified" means the contributions are tax deductible and neither the contributions nor their earnings are taxed as income to the beneficiary until taken out in accordance with the plan. *See* I.R.C. §§ 401, 402.[5]

The question then is whether Congress intended for ERISA protection to lapse when a beneficiary of such a plan takes bankruptcy. Four circuits have taken the position that Congress intended the exclusionary

---

[4] "Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated." 29 U.S.C. § 1056(d) (1). "A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that benefits provided under the plan may not be assigned or alienated." 26 U.S.C. [I.R.C.] § 401(a)(13). "Under section 401(a)(13), a trust will not be qualified unless the plan of which the trust is a part provides that benefits provided under the plan may not be anticipated, assigned (either at law or in equity), alienated or subject to attachment, garnishment, levy, execution or other legal or equitable process." Treas. Reg. § 1.403(a)-13(b)(1).

[5] Although some of ERISA's provisions are codified in labor law sections 29 U.S.C. §§ 1001-1144, the qualification process is delegated to the Internal Revenue Service.

reference to "applicable nonbankruptcy law" in 11 U.S.C. § 541(c)(2) "as a narrow reference to state 'spendthrift trust' law and not as a broad reference to all other law, both federal and state, including ERISA." *Goff*, 706 F.2d at 577; *see also Graham*, 726 F.2d at 1273; *Lichstrahl*, 750 F.2d at 1490; *Daniel*, 771 F.2d at 1360. These decisions rely upon the following: (1) the general purpose of the Bankruptcy Code to include virtually all of a debtor's property interests in the bankruptcy estate; (2) expressions in the legislative history of § 541(c)(2) focus almost exclusively upon a desire to continue to exclude state-recognized spendthrift trusts; (3) the fact that federal exemption § 522(d)(10)(E) exempts payments under a pension or profit sharing plan "to the extent reasonably necessary for the support of the debtor and any dependent of the debtor"; and (4) the legislative history of § 522(b)(2)(A), exempting property pursuant to "Federal law other than [§ 522(d)(10)(E)]" does not include interests in ERISA-qualified plans in its illustrative list of examples of exempt properties. *See* 706 F.2d at 581-87.

Recent opinions in three other circuit courts considering the matter, however, have reached the contrary result, and have ruled that qualified ERISA pension and profit sharing plan interests are not assets of the bankruptcy estate under § 541(c)(2). *See Anderson v. Raine (In re Moore)*, 907 F.2d 1476, 1477 (4th Cir. 1990); *Forbes v. Lucas (In re Lucas)*, 924 F.2d 597, 601 (6th Cir.), *cert. denied*, 111 S. Ct. 2275 (1991); *Velis v. Kardanis* No. 91-5084, slip op. at 12 (3d Cir. Nov. 14, 1991). These circuits hold that "[a]n appeal to legislative history is inappropriate here because the language of § 541(c)(2) is clear," relying upon *Burlington*

Northern R.R. v. Oklahoma Tax Comm'n, 481 U.S. 454, 461 (1987), and *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 808 n.3 (1989). *Moore*, 907 F.2d at 1478-79. They also view the legislative history as inconclusive. Additionally they rely upon two purposes of ERISA: "to guarantee the security of employees' retirement income" and to ensure "uniform treatment of pension benefits throughout the country." *Id.* at 1479-80; *see also Lucas*, 924 F.2d at 601 ("narrow interpretation" of § 541(c)(2)'s reference to applicable nonbankruptcy law "is also inconsistent with other uses of the identical phrase throughout the Bankruptcy Code, where the phrase is used to refer to the federal as well as state law") (citing *Moore* at 1477).

The Ninth Circuit, which embraced the narrow construction in its *Daniel* case, also appears to be having second thoughts. *See John Hancock Mut. Life Ins. Co. v. Watson (In re Kincaid)*, 917 F.2d 1162, 1166 (9th Cir. 1990) ("We recognize a certain incongruity in the notion that only ERISA's anti-alienation provisions offer protection until bankruptcy, and only state spendthrift provisions do so in bankruptcy. The same might be said of the idea that some ERISA plan benefits are protected from creditors before bankruptcy and lose that protection upon bankruptcy. Yet, that is in accord with the great weight of authority and is the law of this Circuit."); *see also id.* at 1169-70 (Fletcher, J., concurring). *But see Pitrat v. Garlikov*, No. 90-15252, 1991 WL 213896, at *2 (9th Cir. Oct. 25, 1991) (reaffirming *Daniel*).

We are persuaded by the reasoning of the Third, Fourth and Sixth Circuit opinions, and we join them in

holding that a tax-qualified ERISA pension or profit sharing plan is exempt from the bankruptcy estate under § 541(c)(2).[6] We do not perceive an ambiguity in the phrase "applicable nonbankruptcy law" that would permit us to differentiate state from federal law. The phrase on its face is clear and broad. As the Fourth Circuit in *Moore* noted, "when Congress intended to refer to state law, it did so explicitly." *Moore*, 907 F.2d at 1478 (citing examples in 11 U.S.C. §§ 109(c)(2), 522(b)(1) & (2), 523(a)(5)). An interpretation of "applicable nonbankruptcy law" to include both federal and state law is consistent with Congress' use of that same term in other sections of the Bankruptcy Code. In 11 U.S.C. § 101(56), Congress uses the phrase "applicable nonbankruptcy law" to refer to federal laws concerning trade secrets, patents and plant varieties. 11 U.S.C. § 101(56). Sections 108(a), (b) & (c) all use the phrase "applicable nonbankruptcy law," and courts have held that phrase in these subsections refers to federal law. *E.g.*, *Eagle-Picher Indus., Inc. v. United States*, 937 F.2d 625, 639-40 (D.C. Cir. 1991) (Federal Tort Claims Act as applicable nonbankruptcy law under § 108(b)); *Brickley v. United States (In re Brickley)*, 70 B.R. 113, 115-16 (Bankr. 9th Cir. 1986) (IRC statute of limitation, 26 U.S.C. § 6503, as applicable nonbankruptcy law under § 108(c)); *Motor Carrier Audit & Collection Co., a Div. of Delta Traffic Serv., Inc. v. Lighting Prods., Inc.*, 113 B.R. 424, 425-26 (N.D. Ill. 1989) (Interstate Commerce Act as applicable nonbankruptcy law under § 108(a)); *Eisenberg*

---

[6] We express no opinion on the federal exemption provisions of 11 U.S.C. § 522(b)(2)(A) and § 522(d)(10)(E), as no argument based upon those sections has been presented in the appeal.

v. Feiner (In re Ahead by a Length, Inc.), 100 B.R. 157, 162 (Bankr. S.D.N.Y. 1989) (RICO as applicable nonbankruptcy law under § 108(a)). Yet another example of the use of "applicable nonbankruptcy law" to mean both federal and state law is 11 U.S.C. § 1125(d) which states in part, "Whether a disclosure statement . . . contains adequate information is not governed by any otherwise applicable nonbankruptcy law, rule, or regulation . . . ." This subsection's legislative history confirms that the language refers to both federal and state law; more specifically, the language refers to federal and state securities laws. *See* S. Rep. No. 95-989, 95th Cong., 2d Sess. 121 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5907 ("Subsection (d) relieves the court of the need to follow any otherwise applicable Federal or state law in determining the adequacy of the information contained in the disclosure statement . . . ."); H.R. Rep. No. 95-595, 95th Cong., 2d Sess. 409 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6365 ("Subsection (d) excepts the disclosure statements from the requirements of the securities laws (such as section 14 of the 1934 Act and section 5 of the 1933 Act), and from similar State securities laws (blue sky laws, for example)."); *see also* 11 U.S.C.A. § 1125, *Historical and Revision Notes* 528-29 (1979) (quoting Senate and House reports' explanations of subsection (d)); *In re Stanley Hotel, Inc.*, 13 B.R. 926, 931 (Bankr. D. Colo. 1981) (Moore, J.) (Section 1125(d) refers, inter alia, to Securities Act of 1933.). We note that "[s]tatutory phrases are not construed in isolation; they must be construed in the context of the statute or act as a whole. Generally, when the same words are used in different sections of the law, they will be given the same meaning." *Barnson v. United States*, 816 F.2d 549, 554

(10th Cir.) (citations omitted), *cert. denied*, 484 U.S. 896 (1987).

Finding no ambiguity in the language of § 541(c)(2), resort to legislative history is inappropriate. *See Toibb v. Radloff*, 111 S. Ct. 2197, 2200 (1991). But even considering the legislative history, which we acknowledge was almost exclusively concerned with preserving state-recognized spendthrift trusts, we do not find "a clearly expressed legislative intention" to limit the meaning of § 541(c)(2) exclusively to state-recognized spendthrift trusts. *See Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) ("Absent a clearly expressed legislative intention to the contrary, th[e] language must ordinarily be regarded as conclusive."); *see also Toibb*, 111 S. Ct. at 2200 (quoting *Consumer Prod. Safety Comm'n*). In the legislative history we see an explicit desire to allow state-recognized spendthrift trusts but no explicit rejection of federal law including ERISA. We also are persuaded by the incongruity inherent in the narrower interpretation which would result in ERISA's antialienation provisions trumping state law until bankruptcy, but withdrawing that protection upon bankruptcy unless state law would give it.

The apparent overlap of § 522 and § 541, and confusion in the legislative history, may be the result of the fact the report of the Commission on Bankruptcy Laws of the United States recommended eliminating recognition of the spendthrift trust entirely, except for the amount necessary to support the debtor and dependents. *See Goff*, 706 F.2d at 581 n.19. This view was incorporated in the Senate version but rejected in

the House version that was ultimately enacted. Moreover, we find persuasive the explanation offered by the Third Circuit in *Velis*:

> "The argument that if 'applicable nonbankruptcy law' in § 541(c)(2) includes both state and federal law, the exemption provisions of § 522(d)(10)(E) would be superfluous or meaningless overlooks the distinctions between the two sections. Section 522 deals with *distributions* made from a pension plan and distributions which the debtor has a present and immediate right to receive. Even if pension plan assets in the hands of a trustee are beyond the reach of creditors because not a part of the debtor's estate under § 541(c)(2), distributions made from the plan to the debtor would not enjoy such protection, in the absence of exemption under § 522(d)(10)(E)."

Velis, No. 91-5084, slip op. at 8 (citation omitted).

Our position is reenforced by the recent Supreme Court decision in *Guidry v. Sheet Metal Workers National Pension Fund*, 110 S. Ct. 680 (1990), which refused imposition of a constructive trust on a participant's interest in a qualified pension plan for his embezzlement, in the face of another federal statute that arguably would permit such imposition in some circumstances. The Supreme Court relied strongly on ERISA's intended protection of participants' pension benefits:

> "Section 206(d) [of ERISA] reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners (and their

> dependents, who may be, and perhaps usually are, blameless), even if that decision prevents others from securing relief for the wrongs done them. If exceptions to this policy are to be made, it is for Congress to undertake that task.
>
> As a general matter, courts should be loath to announce equitable exceptions to legislative requirements or prohibitions that are unqualified by the statutory text. The creation of such exceptions, in our view, would be especially problematic in the context of an antigarnishment provision. Such a provision acts, by definition, to hinder the collection of a lawful debt. . . .
>
> Understandably, there may be a natural distaste for the result we reach here. The statute, however, is clear. In addition, as has been noted above, the malefactor often is not the only beneficiary of the pension."

Id. at 687-88 (footnote omitted).

Our construction of § 541(c) harmonizes the Bankruptcy Code with the clear policy and intent of ERISA. *See Shumate v. Patterson*, 943 F.2d 362, 365 (4th Cir. 1991) ("[F]ollowing the rule that, whenever possible, statutes should be read in harmony and not in conflict, we interpret these in such a way as to give full effect to both ERISA and the Bankruptcy Code by holding that interests in ERISA-qualified pension plans are excluded from a bankrupt's estate.") (citation omitted).

C

Our conclusion that qualified ERISA plans are not assets of the bankruptcy estate still does not resolve the instant appeal. Although Dr. Harline asserts that he is the participant in a "qualified" ERISA plan, there is no certification in the record that his plan was indeed qualified under the law in effect at the time of his bankruptcy. Indeed, the documents in the appellate record raise some doubt of this as the last plan amendment is dated April 2, 1974, before major changes were made in ERISA that required amendments in nearly all plans. The plan documents in the record, which may be incomplete, would seem to permit Dr. Harline to borrow at four percent interest an amount equal to the total value of his interest if he has need. Amendments to the Weber Clinic Profit-Sharing Trust, Respondent's Ex. Add., tab 2 at 3. ERISA, however, limits borrowing by controlling shareholders of a corporation and requires borrowers to pay "reasonable" rates of interest. *See* I.R.C. §§ 401(a)(13)(A), 4975(d)(1)(D), 4975(e)(2)(E); Treas. Reg. § 1.401(a)(13)(d)(2)(iii). ERISA also requires participants to begin taking their retirement funds by age 70 1/2 years, I.R.C. § 401(a)(9)(C); this plan seems to have no compulsory starting date for fund benefits, merely permitting them after age fifty-five years. Third Amendment to the Profit-Sharing Trust of the Weber Clinic, Respondent's Ex. Add., tab 5 at 2. Dr. Harline's brief in the district court infers that the plan has terminated and that he personally, rather than the corporation, is making premium payments on the insurance policies. *See* I.R. Supp. tab 3 at 3 ("[t]he debtor-defendant had used his own funds, earned post

petition to pay on the premiums due on several of the policies . . .").

We can make no determination on the record before us whether or not the plan is indeed currently "qualified" under ERISA. That is an issue to be addressed on remand. We do hold that if the plan is tax-qualified and Dr. Harline has not retired or terminated employment with the employer sponsor of the plan, his interest is excluded from his bankruptcy estate under § 541(c)(2). If the plan is not qualified then it is not protected by ERISA, nor as a spendthrift trust under state law, and no other "nonbankruptcy" law has been cited which might apply.

The summary judgment in favor of the bankruptcy trustee is REVERSED and the case is REMANDED for further proceedings consistent herewith.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

In Re:	
WESLEY G. HARLINE,	
Debtor	
DAVID L. GLADWELL, Trustee,	
Appellee,	MEMORANDUM DECISION
vs.	
WESLEY G. HARLINE	Civil No. 90-NC-0022-S
Appellant.	

This case is an appeal by the debtor, Dr. Wesley G. Harline, of the bankruptcy court's ruling on David L. Gladwell, Trustee's ("Trustee") motion for summary judgment.

Dr. Harline filed Chapter 11 bankruptcy on February 14, 1986, but failed to list as an asset his beneficial interest in the Weber Clinic Profit Sharing

Trust (the "Trust"). The Trustee filed this adversary proceeding against Key Bank of Utah, the trustee of the Trust, and Dr. Harline intervened to protect his interest in the Trust. Dr. Harline claims that the Trust was a "Spendthrift Trust" under Utah law and thus exempt from the bankruptcy estate. On the Trustee's motion for summary judgment, the bankruptcy court concluded that the Trust was not exempt and ordered Key Bank to turn over Dr. Harline's interest in the Trust to the Trustee.

Dr. Harline appeals the judgment of the bankruptcy court on three bases. First, he contends that questions of fact precluded an entry of summary judgment. Second, Dr. Harline suggests that there was a failure to join indispensable parties in the proceeding below. Finally, Dr. Harline contends that the Trust is exempt because it is a "spendthrift trust" under Utah law.

Questions of Fact

According to Dr. Harline, the bankruptcy court should not have granted summary judgment due to the presence of unresolved factual issues. Dr. Harline claims that insurance policies which constituted the assets of the Trust present issues of fact which have yet to be resolved. He complains that the Trustee failed to introduce those policies below and should thereby be precluded from prevailing on its motion for summary judgment.

If, in fact, the insurance policies did present factual issues, then Dr. Harline should have brought those issues to the attention of the bankruptcy court in resisting the Trustee's motion for summary judgment. He cannot now be heard to complain that the policies precluded

summary judgment having never raised the alleged fact issue below.[1]

Joinder of Necessary Parties

Dr. Harline also contends that the bankruptcy court erred in entering summary judgment in the absence of necessary parties which include the Deferred Compensation Committee (Committee) and the insurance companies.

There are two reasons that the failure to join the Deferred Compensation Committee does not constitute grounds for reversal. First, this issue was never raised below, nor was it included in Dr. Harline's Statement of the Issues on appeal. Second, the Deferred Compensation Committee is not a necessary party as defined by the Federal Rules of Civil Procedure:

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the

---

[1] Rule 56(e) of the Federal Rules of Civil Procedure provides:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

> person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Dr. Harline makes a bald assertion that the Committee is a necessary party to this action. He bases that claim on the fact that the Committee is responsible by the terms of the Trust to monitor any withdrawal from the Trust by a beneficiary. Notably he does not claim that complete relief cannot be accorded between the named parties nor does he claim that the absence of the Committee will impair either the Committee's or the named parties' interests. In fact it is difficult to see how Dr. Harline could make such an argument since he constitutes the *entire* Deferred Compensation Committee.

Although Dr. Harline's Statement of Issues for appeal does include failure to join insurance companies, this issue also was not raised at the bankruptcy court level. Dr. Harline attempts to excuse that omission by claiming that jurisdictional challenges may be raised at any level. The court fails to see how the non-joinder of the insurance companies constitutes a jurisdictional challenge. The court's jurisdiction in this case was predicated on 28 U.S.C. §§ 157 and 1334 rather than diversity jurisdiction. Consequently, there is no threat

that joinder of the alleged necessary insurance companies would defeat jurisdiction. Dr. Harline cannot escape the result of his failure to raise this issue until the appeals stage contrary to the mandate of Fed. R. Civ. P. 12(b)(7).

Even if Dr. Harline had properly raised the issue below, failure to join the insurance parties would not be grounds for dismissal because those parties are not "necessary" within the meaning of Rule 19. Plaintiff's motion for summary judgment sought only the turnover of Dr. Harline's interest in the trust to the bankruptcy trustee. Neither the insurance companies nor the Committee claim an interest in the Trust and therefore have no rights which were affected by the disposition of the bankruptcy court. Failure to join these parties is not error.

Spendthrift Trust

The only real issue in this appeal is whether the Trust as set up by Dr. Harline and others is a spendthrift Trust under Utah law. If it is then it would be exempt from the bankruptcy estate under 11 U.S.C. § 541(c)(2) which provides an exclusion for beneficial trust interests owned by the debtor which are subject to restrictions on transfers enforceable under applicable nonbankruptcy law.

Dr. Harline claims that the Trust is a spendthrift trust because the Deferred Compensation Committee controls the disposition or withdrawal of assets. What he conveniently fails to mention in his brief is that Dr. Harline constitutes the *entire* Committee and therefore has complete control over the operation of the Trust.

A recent Eleventh Circuit decision is directly on point. In *In re Lichstrahl*, 750 F.2d 1488 (11th Cir. 1985), the debtor was a doctor employed by a professional association of which he was the sole director, officer, and stockholder. He created two pension plans as trusts naming his professional association as settlor, himself as trustee and the professional association employees as beneficiaries. When Dr. Lichstrahl filed bankruptcy he listed the trusts as excluded property under 11 U.S.C. § 541(c)(2) claiming that they were spendthrift trusts under Florida law. The bankruptcy court included the trusts in the bankruptcy estate which inclusion was affirmed by the district court. Dr. Lichstrahl appealed to the Eleventh Circuit which held that because Dr. Lichstrahl had sole control over the property of the trusts they were not spendthrift trusts and thus not exempt from the bankruptcy estate:

> Because the purpose of a spendthrift trust is to protect the beneficiary from himself and his creditors, such a trust fails where the beneficiary exercises 'absolute dominion' over the property of the trust.

Id. at 1490. *See also Leach v. Anderson*, 535 P.2d 1241 (Utah 1975).

This court holds that the Trust affords Dr. Harline complete dominion over the Trust and therefore it is not

a spendthrift trust and should be included in the bankruptcy estate. The judgment of the bankruptcy court is affirmed.

DATED this 9th day of July, 1990.

BY THE COURT:

/s/ David Sam
DAVID SAM
U.S. DISTRICT JUDGE

IN THE
UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH,
NORTHERN DIVISION

In Re	) Bankruptcy
	) No. 86A-00623
	) (Chapter 7)
WESLEY G. HARLINE,	)
	)
Debtor	)
	)
	)
DAVID L. GLADWELL,	) Adversary
TRUSTEE,	) No. 88PA-0917
	)
Plaintiff,	) JUDGMENT
	)
vs.	)
	)
KEY BANK OF UTAH,	)
TRUSTEE OF THE	)
WEBER CLINIC PROFIT	)
SHARING TRUST, and	)
WESLEY G. HARLINE,	)
	)
Defendants.	)

On September 28, 1989, the Court heard the Motion of the Plaintiff for Summary Judgment. The Plaintiff and both Defendants appeared by counsel. Upon hearing the argument of counsel, reviewing the pleadings and affidavits on file herein, and reviewing the

exhibits attached to the Supplemental Memorandum in Support of Motion for Summary Judgment, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The Plaintiff is the duly-appointed, qualified and acting trustee of the bankruptcy estate of Wesley G. Harline.

2. The Defendant Key Bank of Utah is the trustee of the Weber Clinic Profit Sharing Trust.

3. The debtor, Wesley G. Harline, filed a voluntary petition in bankruptcy on or about February 14, 1986.

4. As of the date of the bankruptcy filing, the debtor was the sole owner and stockholder of the Weber Clinic, Inc.

5. In its capacity as trustee of the Weber Clinic Profit Sharing Trust, Key Bank of Utah holds in its possession the following insurance policies insuring the life of the debtor:

a. Policy number 098977 issued by Beneficial Life Insurance Company, having a stated net cash value, as of December 28, 1988, of $203,964.59;

b. Policy number 0040223000 issued by Jefferson National Life Insurance Company, having a stated net cash value, as of December 26, 1988, of $96,494.62;

c. Policy number P5059001 issued by New York Life Insurance Company, having a stated net cash value, as of April 5, 1989, of $36,291.32.

6. The debtor was as of the date he filed bankruptcy, and remains, the sole beneficiary of the Weber Clinic Profit Sharing Trust.

7. The debtor was as of the date he filed bankruptcy, and remains, fully vested in his interest in the Weber Clinic Profit Sharing Trust.

8. The debtor did not list his beneficial interest in the Weber Clinic Profit Sharing Trust in his Schedules or in his Statement of Financial Affairs filed in case number 86A-00623.

9. The debtor did not disclose his beneficial interest in the Weber Clinic Profit Sharing Trust to the bankruptcy trustee.

10. Under the terms of the Weber Clinic Profit Sharing Trust, the debtor has the right and the power to direct Key Bank of Utah in the retention, sale, exchange, encumbrance, lease, management and control of the trust assets, and Key Bank of Utah must comply with the debtor's instructions.

11. Upon retirement, the debtor is entitled to receive his beneficial interest in the Weber Clinic Profit Sharing Trust in one or more of three alternatives: one lump sum; equal annual or monthly installments for a fixed period not to exceed the then life expectancy of the debtor; or an annuity for the life of the debtor.

12. The debtor has the right to direct Key Bank of Utah to invest his beneficial interest in the retirement plan in insurance policies.

13. The debtor is entitled to borrow against his beneficial interest in the retirement plan.

14. The debtor has complete control over the management and disposition of trust assets.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over this adversary proceeding under 28 U.S.C. Section 1334.

2. This adversary proceeding is a core proceeding under 28 U.S.C. Section 157.

3. The Weber Clinic Profit Sharing Trust does not constitute a spendthrift trust under Utah law.

4. The debtor is not entitled to claim an exemption in any portion of his beneficial interest in the Weber Clinic Profit Sharing Trust under 11 U.S.C. Section 522.

5. The debtor's entire interest in the Weber Clinic Profit Sharing Trust, including such value as is attributable to the increase in the stated net cash values of the life insurance policies, constitutes property of the bankruptcy estate under 11 U.S.C. Section 541.

6. The debtor's Affidavit in Opposition to Motion for Summary Judgment is inadmissible into evidence on one or more of the following bases: the parol evidence

rule, the doctrine of merger, Rule of Evidence 802, and Rule of Evidence 701.

In accordance with the preceding Findings of Fact and Conclusions of Law, the Court enters the following Judgment:

IT IS ORDERED, ADJUDGED AND DECREED that David L. Gladwell, Trustee and Plaintiff, have and recover JUDGMENT against Key Bank of Utah and Wesley G. Harline for turnover of the debtor's beneficial interest in the Weber Clinic Profit Sharing Trust.

DATED November 7, 1989.

BY THE COURT:

/s/
JOHN H. ALLEN
U.S. Bankruptcy Judge